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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

KAREN DENISE KELLY, Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED FOR REVIEW

Did the police officer's request for the Appellant to go with him from the inside of the house to the front porch constitute a "seizure"; and did the seizure violate the Fourth Amendent to the Federal Constitution because the police had no suspicion that the Appellant was involved in any criminal activity.

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OPINION BELOW

No opinion was rendered by the Supreme Court of Virginia; a copy of that Court's minute entry appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on August 22, 1980. This Court's jurisdiction is invoked under 28.U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The principal United States Constitutional provisions involved are:

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be

seized."

Amendment XIV:

> "All persons born or naturalized in the United States, and subject to the jurisdicition thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE FACTS

The salient facts adduced at trial, in a light most favorable to the Commonwealth, revealed that on August 2, 1979, the Richmond City Police and Vice Squad executed a search warrant at 1010 Woodstock Road, the residence of James Murphy. However, two other people entered the residence and were also being detained, prior to the time Appellant, Karen Denise

Kelly, (herein referred to as the Appellant) entered the residence. Vice-officer Carter (herein referred to as Carter), the only witness at the suppression hearing and trial, could not remember if the Appellant knocked on the door or "just entered" the residence. Tr. 9 When Appellant entered the living room the search was still in progress. Tr. 10 At this time there were two vice-squad officers, two uniform police officer, two suspects under arrest and James Murphy in the living room of the residence. Carter stated that the size of the living room was approximately twelve feet by twenty or twenty-two feet. Tr. 12 When the Appellant entered the living room, James Murphy held his hands up (which at this time were handcuffed) and shook his head in a negative fashion. Carter stated, that at this time he noticed a look of fear on the Appellant's face. Tr. 11

Thereafter, Carter identified himself as a police office and asked the Appellant to step out on the porch. As the Appellant and Carter were going out the door, Carter asked the Appellant if she had any identification. Tr. 13 Carter stated, at the time he asked Appellant to go with him to the porch, the Appellant was not under arrest. When the Appellant and Carter reached the porch, Appellant pulled her purse towards her and opened it. Carter observed what appeared to be marijuana. Tr. 15 Carter stated, that he had "no suspicion to believe" that the Appellant had a gun. Tr. 15 Thus Carter arrested the Appellant and a subsequent search revealed that the purse also contained cocaine.

Carter was asked, by the Commonwealth's Attorney, what he would have

done if Appellant refused to open her purse. Carter replied;

> I had no knowledge of any crime she had committed or was in the process of committing. I would have had no reason to arrest her before that point. I had never seen her before. Tr. 17

Carter stated that the residence had been under surveillance for ninety days and that he had observed the residence at least five times. Carter further stated that when the Appellant came into the house he saw nothing that raised any suspicion that Appellant was involved in any criminal activity. Tr. 33

The Appellant raised the instant issue at the state trial court level. The "Motion to Suppress the Evidence as Violative of the Fourth Amendment" was overruled by the trial court. The Appellant appealed the ruling of the trial court to the Supreme Court of Virginia.

The Supreme Court of Virginia denied the Appellant's Writ of Error and upheld the trial court's ruling.

ARGUMENT

The Fourth Amendment commands that the public shall be secure in their "persons, houses, papers, and effects, against unreasonable searches and seizures . . ." The Fourth Amendment protects people, not places. Katz v. United States, 389 U.S. 347 (1967).

In the case of Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court dealt with the issue of when a police officer may stop a person on less than probable cause. The Court held that such a stop would be justified by "specific and articulate facts which, taken together with rational inferences from those facts," led the officers

"reasonably to conclude . . . that criminal activity [was] afoot." Terry, supra at 21. In Terry the Court recognized that when an officer stopped a person either by physical force or show of authority, even if only to ask questions, that their action nevertheless constituted a "seizure" within the meaning and protection of the Fourth Amendment. Terry, supra at 19. In announcing Terry, the Court recognized subjective good faith on the part of the officer was never sufficient to sustain an intrusion.

Nevertheless, the Court recognized in Terry that some contacts between the police and private citizens are not within the purview of the Fourth Amendment:

> We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously, not all personal intercourses between policemen and citizens

> involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. Terry, supra at p 19 n. 16

Appellant contends that the category of cases involving, "personal intercourse between policemen and citizens," is narrowly circumscribed by Terry's further observation that Fourth Amendment "seizures" occur when liberty is restrained "by a show of authority." Indeed, many suspects who are "seized," within the meaning of the Fourth Amendment "show of authority" criterion, retain significant freedom of action. Evidence of such residual liberty cannot cancel the fact that an official restraint has been imposed amounting to a constitutional encroachment. In the case at bar, Appellant was immediately asked by the

police officer to step out on the porch and for some identification. Tr. 13 The police officer stated that he had no reason to believe Appellant had committed a crime or was in the process of committing any crime. Tr. 17 The officer further stated he had never seen the Appellant before and nothing raised any suspicions that Appellant was involved in any criminal activity. Tr. 33

In the case of Brown v. Texas, 443 U.S. 47 (1979) the United States Supreme Court dealt squarely with the issue involved in the case at bar. In Brown two police officers were cruising in a patrol car when they observed the defendant and another man walking in opposite directions away from one another in the alley. The police car entered the alley and one of the officers got out and

asked the defendant to identify himself. The officer testified that he stopped the defendant because the situation "looked suspicious and we had never seen that subject in the area before." The area where defendant was stopped had a high incidence of drug traffic. However, the officers did not claim to suspect defendant of any specific misconduct nor did they believe that he was armed. The Supreme Court held,

> when the officers detained Appellant [Brown] for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment. . . . The Fourth Amendment, of course, applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. (cites omitted) Brown at page 50

The Court in Brown, held that under the Terry Doctrine police must have a

reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. The Court further stated that the flaw in the states' case is that none of the circumstances preceeding the officers' asking the defendant to identify himself justified a reasonable suspicion that he was involved in criminal conduct. In fact, when pressed the officer acknowledged that the only reason he stopped the defendant was to ascertain his identity. Thus, in the absence of any basis suspecting the defendant of misconduct, the balance between the public interest and defendant's right to personal security and privacy tilts in favor of freedom from police interference. Thereby, prompting the Court in Brown to state,

> In the absence of any basis for suspecting appellant of mis-

> conduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference . . . even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceed tolerable limits. Brown, supra, at 52

In United States v. Mendenhall, ____ U.S. _____, 64 L.Ed.2d 497, 100 S.Ct. _____ (1980) the defendant was observed by two agents of the DEA, who were present at the airport for the purpose of detecting unlawful traffic in narcotics. The agents observed the defendant then approached her and identified themselves as federal agents. Thereafter asked the defendant to see her identification and airline

ticket. The name on the driver's license did not match the name on the airline ticket, which the defendant possessed. Then the agents asked the defendant to accompany him to the airport DEA office for further questions.

The Court held ". . . that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would believe that he was not free to leave." Mendenhall at page 497. The Court went further and gave examples of circumstances that might indicate a seizure, even where the person did not attempt to leave. These examples are as follows: The threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of

the citizen, or the use of language or tone of the officer's voice.

The facts of the instant case indicate that a reasonable person would not believe that he was free to leave. For example, the Appellant entered an apartment in which a search was in progress. Three people were in the room the Appellant entered. One person, who was in the said room, raised his cuffed hands and shook his head in a negative fashion. At this time Officer Carter, one of the five officers in the room, identified himself as a police officer and asked the Appellant to step out on the porch. Officer Carter also stated he had no prior conformation about the Appellant and that when she came into the house he saw nothing that raised any suspicion that the Appellant was involved in any criminal activity.

A separate opinion by Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Blackmun joined, did not reach the issue of whether the agents "seized" Mendenhall within the meaning of the Fourth Amendment. Mr. Justice White, with whom Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Stevens joined, dissented holding that Mendenhall was seized within the meaning of the Fourth Amendment when she was stopped by the DEA agents.

In Reid v. Georgia, ____U.S.____, 65 L.Ed.2d 890, 100 S.Ct.____(1980) the defendant arrived at the Atlanta Airport on a flight from Fort Lauderdale, Florida. The agent noticed what he believed to be suspicious conduct by the defendant. The agent approached the defendant, identified himself as a federal narcotics agent and asked defendant to show hi airline ticket stubs and his identification. Thereafter,

the agent asked the defendant to return to the terminal, at which time defendant nodded his head affirmatively. As they entered the terminal the Petitioner began to run and was shortly thereafter apprehended. The Court held as follows:

> We conclude that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity as the basis of these observed circumstances. Reid at page 894.

Thus, the Court concluded that the DEA agent unlawfully seized the Petitioner when the agent approached him outside the airline terminal.

Therefore the Petitioner contends that when the police officer removed her from inside the house to the outside porch he "seized" her within the meaning of the Fourth Amendment; and, because the police officer had no reason to suspect her of any criminal activity the

"seizure" violated the Fourth Amendment.

CERTIFICATE

I hereby certify that I have mailed three (3) true and exact copies of the foregoing Petition for Writ of Certiorari to the Attorney General for the Commonwealth of Virginia at his office at 1101 East Broad Street, Richmond, Virginia 23219, first class mail, postage prepaid, on this 20th day of November 1980.

Michael Morchower,
Counsel

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 22nd *day of* August, 1980.

Karen Denise Kelly, Apellant,

against Record No. 800366
Circuit Court No. 79-427-F

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Richmond, Division II

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk